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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ZACHARIAH VILLALVA, Defendant and Appellant.	D073699 (Super. Ct. No. SCD271327; SCD274607)

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed.

David W. Boudreau, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

The issue in this case is whether under Proposition 47 a felony violation of receiving a stolen motor vehicle under Penal Code[1] section 496d, subdivision (a) (hereafter section 496d) requires the prosecution to prove the value of the vehicle was $950 or more. There is a split of appellate authority on this point and the issue is pending before the California Supreme Court in *People v. Orozco* (2018) 24 Cal.App.5th 667 (*Orozco*), reviewed granted August 15, 2018, S249495. Pending further guidance from the Supreme Court and following *Orozco*, we conclude that section 496d was not affected by Proposition 47 and, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying Zachariah[2] Villalva's convictions are for the most part not pertinent to this appeal. A jury convicted him of receiving a stolen vehicle (a 1998 Honda Civic) (§ 496d; count 1), obtaining personal identifying information with intent to defraud (§ 530.5, subd. (c)(1); counts 3-5), and possessing burglary tools (§ 466; count 6). The Attorney General concedes that no evidence of the value or condition of the stolen vehicle was introduced at trial.

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1 Undesignated statutory references are to the Penal Code.

2 The public defender informed the court on February 13, 2018, that defendant's true first name was "Zachariah" (as filed in case SCD721327), but that case SCD274607 had been filed as "Riah." The plea form in SCD271327 is captioned, and defendant signed it, as "Zachariah." Defendant also identifies himself as "Zachariah" in a letter to the court. The verdict forms in SCD274607 and the abstract of judgment for *both cases*, however, show defendant's name as "Riah." In light of these inconsistencies, we will remand the matter to the trial court for a determination of defendant's true name and, if necessary, correction of the abstract of judgment in that regard.

In separate proceedings outside the jury's presence, Villalva admitted that with respect to count 1 (receiving a stolen vehicle), he committed that offense while released from custody on bail (§ 12022.1, subd. (b)), and he had previously been convicted of a felony vehicle theft (§ 666.5, subd. (a)). Villalva also admitted two prison prior convictions (§ 667.5, subd. (b)) and one prior strike (§ 667, subds. (b)-(i) & 1170.12).

At a sentencing hearing on these offenses, as well as on the case (SCD271327) in which Villalva had pleaded guilty to burglary (§ 459), heroin possession (Health & Saf. Code, § 11350, subd. (a)), and methamphetamine possession (Health & Saf. Code, § 11377, subd. (a)), the court sentenced Villalva to a combined prison term of 10 years four months, which included eight years for his felony conviction under section 496d.

DISCUSSION

A. *Relevant Statutes*

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.'" (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597.)

1. *Petty theft*

Proposition 47 created section 490.2, generally providing that all thefts of property under $950 be petty thefts punishable only as a misdemeanor:

> "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the . . . personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."[3] (§ 490.2, subd. (a).)

2. *Receiving stolen property*

Before Proposition 47, section 496, receiving stolen property, gave the prosecution discretion to charge the offense as a misdemeanor if the value of the property did not exceed $950. (*People v. Varner* (2016) 3 Cal.App.5th 360, 366, rev. granted Nov. 22, 2016 & dism. Aug 9, 2017, S237679 (*Varner*).[4] Proposition 47 amended section 496 to provide that if the defendant receives "any property" that is $950 or less, the offense shall be a misdemeanor except for some ineligible individuals:

> "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained . . . shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred

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[3] Certain repeat offenders are excepted from section 490.2.

[4] The Supreme Court deferred briefing in *Varner* and held the case pending disposition of *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*). The court dismissed *Varner* after issuing *Romanowski*. Upon the dismissal of review, the published Court of Appeal opinion in *Varner* "regains binding or precedential effect under [Cal. Rules of Court,] rule 8.115(e)(2)." (Com. to Cal. Rules of Court, rule 8.1115.)

fifty dollars ($950), the offense shall be a misdemeanor . . . ."
(§ 496, subd. (a).)

3. *Receiving a stolen vehicle*

Proposition 47 did *not* amend section 496d, the statute under which Villalva was convicted. That statute provides in part that a person who "receives any motor vehicle . . . that has been obtained in any manner constituting theft . . . , knowing the property to be stolen or obtained" shall be convicted of either a misdemeanor or a felony.

B. *Villalva's Contentions*

Villalva contends that his felony conviction for violating section 496d should be reduced to a misdemeanor because there was no evidence the vehicle had a value over $950, in effect making the crime a petty theft under section 490.2. He asserts that the California Supreme Court's decisions in *Romanowski*, *supra*, 2 Cal.5th 903 and *People v. Page* (2017) 3 Cal.5th 1175 (*Page*) compel the conclusion that section 490.2 should be applied to section 496d and that we should follow *People v. Williams* (2018) 23 Cal.App.5th 641 (*Williams*), which held that Proposition 47 applies to section 496d.

C. *Analysis*

The interpretation of a voter initiative relies on "the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is

ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.)

We first consider whether the offense of receiving a stolen vehicle is encompassed within section 490.2, the new petty theft statute. As noted, under section 490.2, notwithstanding any other provision of law defining grand theft, "obtaining any property by theft" where the property's value does not exceed $950 "shall be punished as a misdemeanor."

In *Romanowksi*, *supra*, 2 Cal.5th 903, the court considered whether a conviction under section 484e, subdivision (d) qualified for resentencing under section 490.2. Section 484e, subdivision (d) provides that a person who "acquires or retains possession of access card account information . . . validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is *guilty of grand theft*." (Italics added.) Because the statute in *Romanowski* explicitly defined theft of access card information as grand theft, the court readily found the statute fell within section 490.2, which by its own terms applies "[n]otwithstanding . . . any other provision of law defining grand theft . . . ." (See discussion in *People v. Soto* (2018) 23 Cal.App.5th 813, 821 (*Soto*).)[5]

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5 Villalva contends that in *Romanowski*, the court applied section 490.2 to an offense, like section 496d, that does not include theft as an element. We disagree. *Romanowski* considered section 484e, subdivision (d), which expressly states that crime is "grand theft." (*Romanowski*, *supra*, 2 Cal.5th at p. 908.) Section 496d has no similar language.

Page, *supra*, 3 Cal.5th 1175 addressed whether Proposition 47 applied to a conviction under Vehicle Code section 10851, a statute that encompasses both theft and nontheft offenses (e.g., joyriding). Citing *Romanowski*, the court concluded that section 490.2 covers the *theft* form of violating Vehicle Code section 10851. (*Page*, at p. 1183.)

The teaching of *Page*, *supra*, 3 Cal.5th 1175 is that in determining whether section 490.2 applies, the focus is on the conduct being criminalized—whether such conduct is theft—and not whether the particular statute under which the defendant was convicted was expressly amended by Proposition 47. "[I]ndeed, the statute in *Page* was not even located in the Penal Code." (*Soto*, *supra*, 23 Cal.App.5th at p. 822, italics omitted.)[6] "*Romanowski* and *Page* consider whether stealing a particular type of property (access card information or a vehicle) could constitute petty theft. Both cases involve crimes that were previously classified as grand theft." (*Soto*, *supra*, 23 Cal.App.5th at p. 822.) However, neither *Romanowski* nor *Page* considered Proposition 47 eligibility for an offense "that is not identified as grand theft and requires additional necessary elements beyond the theft itself." (*Soto*, at p. 822, italics omitted.)

Villalva was convicted under section 496d, which has three elements: (1) the vehicle was stolen, (2) the defendant knew the vehicle was stolen, and (3) the defendant had possession of the stolen vehicle. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.)

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6 We thus agree with Villalva's assertion that the fact section 496d was not expressly amended by Proposition is not determinative.

Theft under California law is an unlawful *taking*. (*Page, supra*, 3 Cal.5th at p. 1182; *People v. Gonzales* (2017) 2 Cal.5th 858, 864-865.) Villalva was not charged with or convicted of stealing the vehicle. Although receiving stolen property is a theft-*related* crime, it is not a taking and is, therefore, not a theft. The person receiving the stolen vehicle does not obtain it by theft. Indeed, a person cannot be convicted of stealing and receiving the same property. (*People v. Garza* (2005) 35 Cal.4th 866, 875.) Thus, because Villalva was convicted of receiving the stolen vehicle, he could not be convicted of stealing that same vehicle.

Villalva's contention that section 496d is a theft crime is untenable. A violation of section 496d is not based on the actual theft of the vehicle, but rather on acts committed afterwards. The statute criminalizes buying, receiving, concealing, or withholding vehicles that have already been obtained by theft. Section 490.2 proscribes "obtaining any property by theft" while section 496d proscribes receiving a vehicle that has already been stolen. Therefore, Villalva's conviction under section 496d is not petty theft under section 490.2.

This conclusion is consistent with *Varner*, *supra*, 3 Cal.App.5th 360, where Division Two of the Fourth District found "no indication that the drafters of Proposition 47 intended to include section 496d." (*Id.* at p. 366.) The *Varner* court pointed out that Proposition 47 expressly amended the *general* receiving stolen property statute, section 496, subdivision (a), to classify a violation involving property valued at less than $950 as a misdemeanor where it was a wobbler before. "If section 490.2 applied to receiving

stolen property offenses, there would have been no need to amend section 496." (*Varner*, at p. 367.)

The *Varner* court found further support for its conclusion because section 490.2 begins with the phrase "'[n]otwithstanding Section 487 or any other provision of law defining grand theft.'" (*Varner, supra,* 3 Cal.App.5th at p. 367.) Given that broad language, a person convicted of obtaining property by theft where the value of the property taken is less than $950 is within the scope of Proposition 47. "The drafters of Proposition 47 knew how to indicate when they intended to affect punishment for an offense the proposition was not directly amending." (*Varner*, at p. 367.)

However, there is no equivalent prefatory language in section 496, subdivision (a)—the general receiving stolen property statute. "This 'notwithstanding' language is conspicuously absent from section 496, subdivision (a)." (*Varner*, *supra*, 3 Cal.App.5th at p. 367.) Thus, there is nothing in section 496, subdivision (a) indicating that its provisions are to apply to the entire subject of receiving stolen property. That the drafters of Proposition 47 included such language in section 490.2 but did not include such sweeping language in section 496, subdivision (a) strongly indicates that section 496 is not to operate in the same fashion. Accordingly, "[b]ecause that provision contains no reference to section 496d, we must assume the drafters intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies." (*Varner*, at p. 367.)

In *Orozco, supra,* 24 Cal.App.5th at page 674, we agreed with *Varner*, *supra*, 3 Cal.App.5th 360. We reaffirm that holding here and also note that *People v. Bussey*

(2018) 24 Cal.App.5th 1056 (*Bussey*), review granted September 12, 2018, S250152, is in accord with our decision.

Disagreeing with this analysis, Villalva relies on the First District's decision in *Williams, supra,* 23 Cal.App.5th 641, which held that section 496d "is a theft statute" and did not find "any logical basis" to distinguish for Proposition 47 purposes between the receipt of stolen property generally (under section 496, subdivision (a)) and receipt of a stolen vehicle. (*Williams*, at p. 649.) Relying on *Romanowski, supra,* 2 Cal.5th 903, the court in *Williams* analogized section 496d to section 484e and found them both to be theft statutes. (*Williams*, at pp. 649-650.)

We are not persuaded by the reasoning in *Williams*. That court did not acknowledge that the offense described in section 484e, subdivision (d) is expressly defined as "grand theft" and that alone brought it within section 490.2. Unlike section 484e, subdivision (d), the statute under which Villalva was convicted, section 496d does not define that crime as a theft offense. *Romanowski, supra,* 2 Cal.5th 903 does not hold or suggest that section 490.2 extends to offenses that do not constitute theft.

Moreover, although the court in *Williams* cites *Page, supra,* 3 Cal.5th 1175 for the proposition that a vehicle is personal property (*Williams*, at p. 649), the *Williams* court does not address that the statutory language interpreted in *Page* is not present in section 496d. The statute addressed in *Page*, section 490.2, subdivision (a), begins with the phrase "[n]otwithstanding Section 487 or any other provision of law defining grand theft." But there is no equivalent language in section 496, subdivision (a). As explained in *Page*, Proposition 47 applies to certain violations of Vehicle Code section 10851

because of the broad, preemptive language in section 490.2. Proposition 47 did not enact similar language in the context of receiving stolen property. The lack of such a provision, coupled with the fact that the initiative did not amend section 496d, is dispositive.

Additionally, we disagree with the *Williams* court's conclusion that there is no "logical" basis for distinguishing between receiving stolen property generally and receiving a stolen vehicle for Proposition 47 purposes. (*Williams*, *supra*, 23 Cal.App.5th at p. 649.) Individuals rely on their vehicles to get to work and to obtain life's necessities. "The drafters may rationally have believed harsher treatment was warranted because there are people who depend on this type of low-value vehicle for essential transportation that they could not otherwise afford." (*Bussey*, *supra*, 24 Cal.App.5th at p. 1064, review granted Sept. 12, 2018, S250152.)

DISPOSITION

The judgment is affirmed. In light of inconsistencies in the record, the matter is remanded to the trial court to determine defendant's true name and, if necessary, to correct the abstract of judgment in that regard.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.